

Preliminary questions on the proposal by the African group on a Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive Centers (document SCCR/20/11) as asked by the European Union during the 21st session of the SCCR (8 - 12 November 2010)

At the 21st session of the SCCR (8-12 November 2010) the European Union and his 27 Member States asked a number of preliminary questions on the proposal by the African group on a Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive Centers (document SCCR/20/11). The questions below are structured article by article.

Article 2. Purpose

Questions:

1) This provision states that the purpose of this Treaty is to provide for “minimum elements of flexibility to be included in national copyright legislation, with a view to allowing the following beneficiaries to access protected works”.

In this regard we wonder what is meant by the notion “minimum flexibilities in copyright laws”. Does this relate to exceptions and/or compulsory licenses? Would contracting parties be obliged to introduce such flexibilities in their national legislation? If this implies that contracting parties have to introduce an exception, then how does this relate to the optional character of exceptions, and to the three steps test as contained in the Berne Convention (Article 9.2), the WCT (Article 10), the WPPT (Article 16), the Rome Convention (Article 15) and the TRIPs Agreement (Article 14)?

Article 3. Nature and Scope of Obligations

This Article states under (a) that “Contracting Parties shall agree to undertake appropriate measures”. We wonder whether this means practical measures or legal measures.

Article 4. Relation to Other Agreements

This Article provides under (a) that Contracting Parties shall agree that the provisions of this Treaty are consistent with obligations set out under those of the 7 enumerated treaties and conventions to which they are a (contracting) party. In this regard we would have following preliminary questions:

1) We wonder what is meant by the sentence “Contracting Parties shall agree that the provisions of this Treaty are consistent with obligations set out under the following treaties”. Why does this formulation differ from a more “classical” formulation that is e.g. contained in Article 1 of the WCT and Article 1 of the WPPT (which reads as follows: “nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the

Berne Convention/ Rome Convention (...)"?)

2) Article 5 appears to provide for a mandatory exception for the benefit of disabled persons. As mentioned in the commentary to Article 2, the question rises how/ to what extent such a provision would relate to the Bern Convention (Article 9.2), the WCT (Article. 10), the WPPT(Article 16), the Rome Convention (Article 15) and the TRIPs Agreement (Article 14), i.e. five of the seven instruments mentioned in this Article.

3) The Article further provides under (b) that "Contracting Parties agree that, to the extent that this Treaty applies to literary and artistic works as defined in the Berne Convention, it is a special agreement within the meaning of Article 20 of that Convention, as regards Contracting Parties that are countries of the union established by that Convention."

Such a special agreement should comply with the conditions laid down in Article.20 (i.e.. only contracting parties to Berne Convention and provisions shall be "not contrary to" the Berne Convention). The three steps test as contained inter alia in Article 9.2 of the Berne Convention, is not mentioned in the proposal. Does this mean that the three steps test does not apply to the exceptions that are introduced on the basis of the proposal?

Article 5. Limitations and exceptions to copyright

Under Article 4 (c) a possibility of commercial rental is provided to for profit-entities, if any of 3 enumerated conditions are met.

The commercial rental is provided as an exclusive right in Articles 7 WCT, 9 WPPT, and 11 TRIPS. One might query how conferring a commercial rental right to for profit entities on the basis of an exception for the benefit of disabled persons would relate to the aforementioned provisions, and to the three step test as enshrined in the Bern Convention (Article 9.2), the WCT (Article 10), the WPPT (Article 16), the Rome Convention (Article 15) and the TRIPS Agreement (Article 14). Furthermore, we wonder whether some safeguards against possible abuse by for profit entities should not be foreseen. The word "any" appears to imply that these conditions are alternative and not cumulative. In light of the above, we query whether such an exception would not be too broadly formulated?

Article 8 Libraries and archives

The provision under Article 8, (e) (as well as Article 7 (e) and Article 19) provides de facto for an exception for orphaned works, whereas orphaned works can still enjoy copyright protection. During past standing committees, the EU has proposed to tackle the phenomenon of orphaned works in the SCCR, as it concerns a complex subject which merits appropriate consideration. It involves, inter alia, the identification and location of the rightholder/ heirs and to provide for solutions enhancing legal certainty in case the right holder cannot be found. Would it not be advisable to study and discuss the issue more in depth before advancing particular solutions?